No. [illegible]

—IN THE—

UNITED STATES COURT OF APPEALS,

FOR THE NINTH CIRCUIT.

BOISE CITY ARTESIAN HOT AND COLD WATER COMPANY, Limited, Plaintiff in Error,

vs.

BOISE CITY, IDAHO, Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

JOHN J. BLAKE,
CHARLES S. KINGSLEY AND
W. E. BORAH,
Attorneys for Defendant in Error.

FEB 28 1903

—IN THE—

UNITED STATES COURT OF APPEALS,

FOR THE NINTH CIRCUIT.

BOISE CITY ARTESIAN HOT AND COLD WATER COMPANY, Limited, Plaintiff in Error,

vs.

BOISE CITY, IDAHO, Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

JOHN J. BLAKE,
CHARLES S. KINGSLEY AND
W. E. BORAH,
Attorneys for Defendant in Error.

STATEMENT.

The complainant brings this action against the defendant for the value of water which it alleges was taken from the pipes of the complainant company and used by the defendant. The complaint discloses that the complainant is a corporation organized and existing under and by virtue of the laws of the State of West Virginia. That it is the alleged successor in interest of the Artesian Hot and Cold Water Company, which was organized under the laws of the State of Idaho and which undertook to transfer its property rights and franchises to the complainant. It is

further set forth that the complainant is the owner of the water in question which was taken, that it had certain value, and asks for damages. The answer puts in issue all the material allegations of the complaint. The main question presented by the action is whether or not the appellant is obliged, under the laws of the State of Idaho, to furnish water to the respondent free for fire purposes and other great necessities, and whether or not "other great necessities" include water for street sprinkling purposes. It is contended by the respondent that, under the statutes of the State of Idaho, the complainant in error is bound to furnish water free to the city for street sprinkling purposes and that the plaintiff in error has not disclosed any facts by which it has been relieved of this obligation thus imposed by law.

Argument.

The statute to which we refer, and which has been the law of Idaho since 1887, reads as follows:

"Section 2711. All corporations formed to supply water to cities or towns must furnish pure, fresh water to the inhabitants thereof for family uses so long as the supply permits, at reasonable rates without distinction of person, upon their demand therefor, and must furnish water to the extent of their means in case of fire or other great necessities, free of charge. The rates to be charged for water must be determined by commissioners to be selected, as follows." (The remaining portion of the statute is immaterial to this discussion at this time.)

This statute was taken from the laws of the State of California. It had there received consideration from the Courts and had been construed in both Federal and State Courts. The clause "other great necessities" had been held

to bind the company to furnish water free for street sprinkling purposes, flushing sewers, etc. It may be safely said that the authorities below fully sustain the contention of the defendant in error, that is, that this statute as construed by the courts of California would obligate the complainant company to furnish water free for fire purposes and street sprinkling, the latter being the particular use of water involved.

Spring Valley Water Co. vs. City, 52 Cal. 111.
San Diego Water Co. vs. City, 59 Cal. 517.
Hawes vs. Company, 5 Sawyer, 281.
City vs. Spring Valley Co. 48 Cal. 493.
Hawes vs. Water Co. 104 U. S. 827.
City of Boise vs. Artesian Hot & Cold Water Co. 39 Pac. 562.
Spring Valley Water Co. vs. San Francisco, 61 Cal. 3, 18.

This construction of this statute had been placed upon the same prior to its adoption by the Legislature of the State of Idaho. We are therefore in a position to invoke the well established rule: When a Legislature enacts a statute which is a transcript of a statute of another State that has received a known judicial construction by the courts of that State, it is deemed the Legislature adopted that construction as an integral part of its act.

Coulan vs. Douall, 133 U. S. 216.
Metropolitan Ry. Co. vs. Moore, 121 U. S. 572.
Willis vs. Eastern Trust Co. 169 U. S. 295.
Henrietta M. Z. M. Co. vs. Gardener, 173 U. S. 123.

Federal courts will follow decisions of highest State courts construing statutes and Constitution of the State.

Sioux Ry. Co. vs. Trust Co. 173 U. S. 99.
Andrews vs. National F. & P. Works, 76 Fed. 166.

We urge, therefore, that as the statute stands it obligates the appellant to furnish water free to the defendant for street sprinkling purposes and that the learned Court below committed no error in so holding and excluding testimony which was sought to be introduced as to the value of this water, which under the law it was to furnish without price.

But the appellant seeks to avoid the force and effect of this statute by invoking the aid of a supposed grant or franchise which it was contended upon the trial below exempted the company from this obligation or duty. The franchise, so called, is as follows:

"Section 1. H. B. Eastman and B. M. Eastman and their successors in interest in their waterworks, for the supply of mountain water to the residents of Boise City, are hereby authorized to lay and repair their pipes in, through and along the streets and alleys of Boise City, under the surface thereof; but they shall at all times restore and leave all streets and alleys in, through, along and across which they may lay such pipes, in as good condition as they shall find the same, and shall at all times promply repair all damage done by them or their pipes, or by water escaping therefrom.

"Section 2. This ordinance shall take effect from and after its passage and approval. Approved October 3, 1889."

It is alleged that said Eastman Brothers promptly accepted this grant, or franchise as they deem it, and that they afterwards transferred their right and interest to the Artesian Hot & Cold Water Company, Limited, on the 28th day of March, 1891. This company last named, the articles of incorporation of which are in evidence, stated, among other things, in its articles of incorporation as follows:

"2. The purposes for which it is formed are: To acquire, develop and hold springs, wells and streams of both hot and cold water and conduct the waters thereof to Boise City and vicinity in Ada County, State of Idaho, for the use of said city and the inhabitants thereof; to furnish said waters for municipal, fire, sanitary, domestic, heating, mechanical and other useful and beneficial purposes and to supply the same to the inhabitants thereof to the said Boise City and vicinity for said purposes." (Transcript, page 110.)

The effect of the plaintiff's contention upon this point is that by reason of certain grants and franchises and privileges which were given to the Eastman Brothers and by reason of the transfer of those rights, whatever they were, to the predecessor company of plaintiff's and to the plaintiff, thereby enabling them to enjoy all that Eastman Brothers could have enjoyed, they are exempted from the duty or obligation generally imposed by law under the statute to furnish water free for certain purposes. It will be conceded, I presume, that ordinarily under the general law of the State organized at the time and in the manner of the Idaho company would be compelled to furnish water free for street sprinkling purposes and other municipal purposes, but this burden, they claim is taken off by reason of this grant from the city and by reason of certain vested rights having been acquired before the passing of the act of 1887, known as the "Free Water Law." Conceding for the present that whatever rights Eastman Brothers had were transferred and inured undiminished to the benefit of the Idaho company, we take up the other question: Has there been any grant or privilege given to Eastman Brothers which exonerates their successors from the duties and liabilities and obligations imposed upon all companies

formed under the laws of the State of Idaho—have such companies passed beyond State control in this respect? The effect of the claim of plaintiff, of course, is that certain immunities from legislative control and certain obligations have been granted by virtue of this ordinance, which we have quoted in full.

It will be noticed that the ordinance is wholly silent upon the subject matter with which we are dealing in this case. It does not touch the subject of rights nor the duties of the company toward the city, and certainly in no sense does it contract with Eastman Brothers that they are to be paid for water furnished to the city.

We invoke, in the first place, therefore, the rule that they can take nothing in the way of a grant or in the way of immunity by intent or implication; they must show by clear and express terms of the grant, franchise or contract that this immunity or privilege or right exists toward them and on their behalf, for all that is not expressly and especially given is presumed against the company and in favor of the city or the State. This rule of law is now elementary.

It is difficult to select from the multitude of authorities those which seem most desirable for citation, and for this reason the brief may seem unnecessarily long.

In the case below the question was whether or not the C. B. & Q. Ry. Co., by reason of the charter given them by the Legislature, was exempted from State control as to rates to be charged for the carrying of passengers, it being provided in their charter as follows: "The Board of Directors shall have power to establish such rates of toll for the conveyance of persons or property upon the same as they shall from time to time by their by-laws determine and to levy and collect the same for the use of said com-

pany." In the general law there was a provision that such rate should not exceed three cents a mile. The Court held that the grant did not relieve the company, saying:

"Grants of immunity from legislative governmental control are never to be presumed. On the contrary the presumptions are all the other way, and unless exemption is clearly established, the Legislature is free to act on all subjects within its jurisdiction as the public interest may seem to require. * * * It can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created."

Ruggles vs. People, 108 U. S. 112.

Charles, R. B. vs. Warren, B. 11 Peters, 547.

In the case below the question involved was the validity of a provision, as against the grant, in the charter of a corporation to do certain things. It was said: "The rule of construction in this class of cases is that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be conceded but what is given in unmistakable terms or by implication equally clear. The affirmative must be shown; silence is negation and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this Court."

Northwest Co. vs. Hyde Park, 97 U. S. 1036.

We call attention to the decision in the case below. In this case a company was organized under the laws of the State of Kentucky and it was exempted from State control as to rates up to the time it realized no more than 14 per cent upon the investment. Afterwards a new corporation was formed and the rights of the old company trans-

ferred to the new company with this clause in the grant: "Which company possessing and retaining all the powers, rights and capacities in severalty granted by the act of incorporation and the amendments thereto of the original company." It was held that the new company did not take the exemption of the old company which relieved it from State control for the reason that the grant did not cover immunity and exemption. In the body of the opinion it is said: "We admit there is some ground for the contention that the grant in the act of 1851, to each of the two corporations named in it, of the powers, rights and capacities granted to the corporation of 1834, the Legislature intended to exempt the new corporations as it did the original ones from all legislation that would prevent them from earning as much as 14 per cent on the capital stock expended on their respective roads and for repairs. But as the act of 1851 may not unreasonably be interpreted as intended only to pass to the new corporation such powers, rights and capacities as were necessary to the successful working of the respective roads, and not an exemption from legitimate, ordinary legislative control, it must, in the interests of the public, be so interpreted. It is settled law that in grants by the public nothing passes merely by implication and if a contract with a State relating to the exercises of franchises is susceptible of two meanings, the one restricting, the other extending the powers of a corporation, that construction is to be adopted which works the least harm to the State."

Covington vs. Sanford, 164 U. S. 563.

Hoge vs. Railway Co. 99 U. S. 302.

Bank of Commerce vs. Tenn. 104 U. S. 810.

Syracuse Water Co. vs. City of Syracuse, 5 L. R. A. 546.

In the transfer from Eastman Brothers of the Boise water works the language of the transfer is "all and singular the rights, privileges and franchises granted to said parties of the first part and their successors in interest in said water works by said Boise City by ordinance No. 94, passed October 3, 1889, whereby said parties of the first part and their successors in interest in their water works for the supplying of mountain water to the *inhabitants* of Boise City, are authorized, etc." It will be noticed that neither in the original ordinance nor in the transfer from Eastman Brothers to the Idaho company is there any effort to cover the question of furnishing water to the city and no attempt to contract for prices or exempt the Eastman Brothers or their successors in interest from any control which the Legislature may see fit to make.

This rule has been invoked of course a great many times and applied to a multitude of charters and grants, and we simply give a few of the authorities and references which may be of interest in the further investigation of this subject.

Perasall vs. G. M. Ry. Co. 161 U. S. 838.
Clark & Marshall, Vol. 2, pages 983, 985.
Phoenix Insurance Co. vs. State, 161 U. S. 660.
Syracuse Water Co. vs. City, 116 N. Y. 167.
Birmingham vs. Birmingham, 58 Am. Rep. 618.
N. O. Gas. Co. vs. Louisiana, 115 U. S. 520.

We call attention to this rule as applied to grants or franchises made by cities. Of course the same rule applies with reference to grants or franchises upon the part of the city as it does when the same is granted by the Legislature, that is to say, that nothing is to be taken by impli-

cation against the public. Therefore an ordinance or a contract by the city in the nature of a grant is to be strictly construed and that which is not expressly given in plain terms is held to be against the grantees and in favor of the city.

In the case below the question arose as to the effect of an ordinance granting a street railway the right to occupy the streets of a city and whether or not the grant was exclusive, and although the ordinance provided that the street railway should occupy the streets of the city for a period of thirty years and that the city should not confer upon any other person or corporation any privilege which would impair or destroy the rights so granted, it was nevertheless held that this was not sufficient to prevent the granting of this right to other railways. In the body of the opinion it is said: "Grants or franchises by public corporations to *individuals* or *private corporations* are to be strictly construed and no exclusive privilege passes unless it be plainly conferred by express words or necessary implication. The grant made by the commonwealth or by the municipal corporation under authority from the commonwealth is to be taken most strongly against the grantee and nothing is to be taken by implication against the public except what necessarily flows from the nature of the terms of the grant."

Indianapolis C. S. Co. vs. C. S. R. Co. 8 L. R. A. 539.
Omaha vs. Cable Co. 30 Fed. 327.

The case below is not entirely dissimilar to the case at bar. In this case the city of Hamilton had granted the plaintiff company, which was organized for the purpose of supplying gas to the city, the right to use its streets and to supply gas to its inhabitants. It had also contracted for

some thirty years with the city for gas, but in 1889 the city refused to contract further. The company demanded the contract, claiming it had the right to expect the contract in view of past transactions and that to refuse to contract was contrary to the ordinance under which it went into the city and to the interpretation which had been placed upon the ordinance by a course of dealings for thirty years. It was held, however, that the city could refuse to contract at any time and that the former contract gave no rights for continuation of the same and that the company had no vested rights to supply the public or private consumers. It was further said in construing the ordinance: "Grants by the public are to be strictly construed. * * * It (the city) made contracts with the company from time to time. The last by its own limitation expired on the first of January, 1889. That the city performed all its contract obligations is not denied, and if the city did not see fit to further contract it was beyond the power of the company to compel them to do so. * * * The general law under which the Hamilton Gas Company was formed was subject to the limitations and reservations contained in this provision of the Constitution. The constitutional provision entered into the general law and operated as to the corporations organized under it in the same manner as a reservation embodied in a special charter."

State vs. City of Hamilton, 23 N. E. 935.

Turnpike Co. vs. City, 3 Wallace, 210.

In the case below the City of Philadelphia granted to the City Railway Company the right to use its streets and provided in the grant that the company should not be charged any more than other charter railway companies as a license, which was $30. A law was afterwards passed

raising this to $50, and it was held that this did not impair the obligation of this contract. That the effect of the contract under the doctrine of strict construction was not that there should never be a change in the amount but at that specific time that that was the reasonable charge to be made.

> Union Railway Co. vs. Philadelphia, 110 U. S. 912.
> City of St. Louis vs. M. R. Co. 13 Mo. Ap. 524.
> Rushville vs. Rushville Co. 15 L. R. A. 321.

Viewing the ordinance of October 3, 1889, in the light of these decisions it seems clear that it can avail the plaintiffs nothing in this action and that the Court below was entirely correct in holding that it in no wise inhibited the Legislature from imposing this obligation upon the plaintiff or its predecessor. This ordinance is wholly silent upon the subject of rights, charges, duties and obligations. It simply gives them a right to go into the city. All other matters are open to future contract or future legislation. The ordinance does not in any way inhibit or contract against future legislation, and whether this franchise, so-called, was in the hands of the Eastman Brothers or their successors, the corporation, the property being dedicated to a public use was subject to such obligations, charges and duties as the State might reasonably impose. And the duty here imposed is one which the Courts have held proper and reasonable. There being nothing in the nature of a contract in this ordinance against free water when Eastman Brothers transferred to the Idaho company, it took the rights subject to all obligations then imposed by statute. The Idaho company organized under the laws of the State and in doing so assumed by virtue of such organization the duties and obligations imposed upon it by the laws of

the State. In other words, the laws of the State under which it was organized became a part of its charter and constituted a part of its contract and obligation with the State. When the company saw fit to accept of its charter for the purpose of furnishing water to the inhabitants of Boise City it at the same time under the law agreed to supply water for certain purposes free of charge. As said in the case of San Diego Water Co. vs. City, *supra*: "As a corporation formed for the purpose of supplying the inhabitants of the city with pure, fresh water the plaintiff is a creature of the laws under which it incorporated, and derives its rights, duties and obligations entirely from them. When it incorporated under those laws it assumed two obligations: First, to furnish water to the extent of its means in case of fire or other great necessities free of charge. Second, to furnish water to the inhabitants of the city for family use upon proper demand at reasonable rates," etc. It was also said by Judge Ross, in the case of Spring Valley Water Company vs. San Francisco: "By incorporating and availing itself of the privileges of this act the company became bound, among other things, to furnish water to the extent of its means to the city in case of fire or other great necessities free of charge."

So we say, by incorporating under the laws of the State of Idaho, by taking advantage of this act to become a corporate body for the purpose of furnishing water to the inhabitants of Boise City, it necessarily and conclusively assumed and contracted to furnish water free to the city for fire and other great necessities. Now, when it took an assignment from Eastman Brothers, what did it get? It certainly did not get a contract which relieved it from this duty or which prohibited the Legislature from imposing it. because the grant is wholly silent upon the subject and does

not purport to cover it in any way, shape or form.

It was said in the argument below that Eastman Brothers, as they exercised this right, did not have to furnish water free because Section 2711 only applies to corporations. Granted for the sake of the argument. Yet they did not have to do so simply because the Legislature did not see fit to extend this obligation or duty to individuals. But there was no reason why the Legislature should not have done so if it had desired to. There was nothing in the ordinance or elsewhere to prevent the Legislature from so doing. Had the Legislature seen fit to exercise its power and incorporate in Section 2711 "individuals," then Eastman Brothers would have been compelled to comply, for there was nothing in their ordinance to relieve them from future legislation. They had seen fit to engage in a business by which they dedicated their property to a public use and it was subject to such duties as the State might see fit to impose. And when they saw fit to organize this into a corporation they then and there, under the laws of the State, elected to take upon them this obligation. It was the law of the land, which of course they were conclusively presumed to know. They elected to go into business under it and when they did so they placed themselves in a position where they could no longer complain of its duties and obligations. If they did not want to comply with this duty they could have exercised their right as individuals until such time as the Legislature should extend this obligation to individuals. As to the rule that where a corporation is organized under the laws of the State the general laws of the State become a part and parcel of the charter and constitute the duties and obligations of the corporation, we cite below some authorities.

What we say is that when a water company, for instance,

is organized for the purpose of supplying the city with water under the general laws of the State with reference to such matters, such corporation organized with the understanding and agreement and obligation with the State that it will do and perform all things required by the general laws of the State.

In the case below the question involved was whether or not an act of the Legislature empowering the State to fix rates was valid as against rates fixed by the city prior to the passage of the act, and it was held that the act was constitutional. In the body of the opinion it is said: "The charter of a corporation formed under the general incorporation act does not consist of its articles of association alone, but of such articles taken in connection with the law under which organization took place. The provisions of the law enter into and form a part of the charter."

> City of Danville vs. Danville Water Co. 53 N. E. 118
>
> People vs. C. G. T. Co. 23 N. E. 798.
>
> Water Co. vs. Fergus, 53 N. E. 363.
>
> City of Danville vs. Danville Co. 180 U. S. 697.
>
> Spring Valley Water Works vs. Schottler, 110 U. S. 173.
>
> Morawetz on Corporations, Vol 1, Sec. 318.

This rule is well illustrated in the case below. There was a general provision of the laws of Massachusetts providing for the incorporation of and defining the powers of manufacturing corporations as affecting particular beer companies. In this general law was a provision that the Legislature should from time to time have the right to provide for the regulation and management of the business of such corporations. The complainant company was incorporated for the purpose of manufacturing malt liquors, and

after its incorporation what is known as the prohibitory liquor law was passed and it was contended that in view of the fact that the State had given it a charter authorizing it to manufacture and sell liquor that it could not afterwards impair the contract by refusing this right, but it was held by the Supreme Court that the general act of the State became a part and parcel of the contract and the State had a right under that portion of the contract to prohibit the sale of liquors. Speaking of this general provision of the law, the Supreme Court said: "This reservation of the power was a part of the contract. * * The charter of the company adopted the provisions of the act of 1809 as a portion of its charter and these provisions remain a part of the charter notwithstanding the subsequent repeal of the act."

Boston Beer Co. vs. Mass. 97 U. S. 989.

"Wherever privileges are bestowed by statute upon a corporation the State may prescribe a return of some equivalent to the public as a condition precedent to the enjoyment of the privilege; and the acceptance of the benefits of the statute make it obligatory upon the corporation to perform its duties to the public. These principles were applied to a water company who was charged as a condition of its acceptance and enjoyment of the privilege granted to it by statute with the duty of furnishing free of charge all the water that may be needed by the city for fire purposes and other public necessities."

Tiedman on Police Powers & Trust, Vol. 2, page 973.
C. B. & Q. Ry. Co. vs. Iowa, 64 U. S. 95.
Central Trust Co. vs. Street Ry. Co. 82 Fed. 6.

By an examination of the charter of the company involved in this suit it will be seen that they specified in

their charter that they were organized for the purpose of supplying water to the inhabitants of Boise City. When they did so, under all the authorities it became part of thei. contractual relationship with the State to supply water free to the city for certain purposes. When it entered into this new relationship with the State it entered into a contract which was a part and parcel of the agreement which brought the corporation into existence and this contract is to be construed in favor of the State.

"A contract concerning governmental functions such as one which affects the right of a city to regulate rates of water companies must be strictly construed; and such functions can not be held to have been stipulated away by doubtful or ambiguous provisions."

Rogers Water Co. vs. Ferguson, 180 U. S. 702.

Counsel have set forth at length in their pleadings and have contended that by reason of certain contracts entered into upon the part of the city with reference to water that certain rights apparently have arisen and that they are entitled to have these rights continued by contracts. So far as any contracts as set forth are concerned they can have no bearing upon the question of whether or not at this time the company is obligated to furnish water free. In the first place, any contract made upon the part of the city was contrary to law and wholly void and no rights could arise nor nothing in the way of an estoppel by reason of such contracts. That the contracts were void see the case below.

San Diego Co. vs. City of San Diego, 59 Cal. 520.

The plaintiff is not a private corporation but a quasi-public corporation. It is in every sense subject to the control of the State and is imposed with a public duty.

"Its property and its effects are devoted to a public use in which the public is interested."

> City of Danville vs. Danville Water Co. 54 N. E. 224.
> City of Danville vs. Danville Water Co. 53 N. E. 118.
> Munn vs. ......, 94 U. S. 77.

"No estoppel can ordinarily arise from the act of a municipal corporation or its officers done in violation of or without authority of the law. Every person is presumed to know the nature and extent of the powers of municipal officers and therefore can not be deemed to have been deceived or misled by acts done without legal authority."

> City of Danville vs. Danville Water Co. 53 N. E. 123.
> Am. and Eng. Ency. of Law, Vol. 29, page 13.
> Dillon on Municipal Corporations, Section 91.
> Syracuse Water Co. vs. City, 5 L. R. A. 546.

It is also contended and alleged in the complaint that by reason of this water having been appropriated or obtained from private lands and not from public streams that a different rule would apply with reference to the control of the same by the State or city. The State, however, makes all water which is sold, rented or distributed for a public use subject to its control and the same does not depend upon the source from which it is appropriated. Our Constitution in this connection provides: "The use of all water now appropriated or that may hereafter be appropriated for sale, rental or distribution; also of all water originally appropriated for private use but which after such appropriation has heretofore been or may hereafter be sold, rented or distributed is hereby declared to be a public use and subject to the regulation and control of the State in the manner prescribed by law."

Art. XV, Sec. 1 (our Constitution was adopted August 6, 1889, and ratified the first of November, 1889).

In the case below it is said: "When water is designed, set apart and devoted to purposes of sale, rental or distribution it is appropriated to those uses or some of them and becomes subject to the public use declared by the Constitution without reference to the mode of acquisition."

Merril vs. Irrigation Co. 44 Pac. 720.
McCreary vs. Beaudry, 7 Pac. 264.
Price vs. Banking Co. 56 Cal. 431.
Fresno vs. Canal Co. 32 Pac. 943.
People vs. Stevens, 62 Cal. 209.

It was insisted in the Court below, and we presume it will be here, that this provision of the statute with reference to free water had been repealed by virtue of an act empowering the Board of County Commissioners to establish a maximum rate for the use of water, passed and approved February 25, 1899.

Session Laws of Idaho, 1899, pages 380, 384.

Section 26 of this act, which is the section relied upon, reads as follows: "That the County Commissioners of each county now organized, and of each county to be hereafter organized in this State shall, at their regular session in January of each year and at such other sessions as they in their discretion may deem proper, hear and consider all applications which may be made to them by any party or parties interested in either furnishing or delivering for compensation, or by any person or persons using or consuming water for irrigation or other beneficial purpose or

purposes from any ditch, canal or conduit, the whole or any part of which shall be in such county, which application shall be supported by such affidavit as the applicant or applicants may present, showing reasonable cause for such Board of County Commissioners to proceed to fix a maximum rate of compensation for water thereafter delivered from such ditch, canal or conduit within such county: *Provided,* That when any ditch, canal or conduit shall extend into two or more counties, the County Commissioners of each of such counties shall fix the maximum rate for water used in that county."

It will be seen from a most casual reading of this section that it has no reference to the subject matter here. It does not purport to provide a means by which rates are fixed for any city or muncipal corporation but simply part of the machinery for fixing rates for canals or ditches for irrigation or other beneficial purposes. At least it does not purport to legislate upon the subject of free water for fire purposes and other great necessities in any city or town. There could be no repeal here unless it would be by implication, as it is not contended that there is an express provision repealing this statute in question. An examination of this act which they claim repeals this free water law shows it is dealing with a subject matter wholly disconnected with the furnishing of water to a city. It is dealing with the subject matter of supplying water from irrigation canals to the users under such canals for agricultural purposes principally. This is particularly disclosed by examining Sections 28, 29 and 30 of said act, as there it is disclosed what is to be taken into consideration, how the rates are to be fixed and the basis for fixing the same, which accentuates the contention that it relates alone in its intent and purpose to irrigating canals. Certainly both these

statutes can stand, that is to say they are not irreconcilable as they have not covered the same subject matter. This being true there can be no repeal.

Repeal by implication is never presumed.

Harford vs. United States, 8 Cranch, 109.

"It must appear that the later provision is certainly and clearly in hostility to the former. If by any reasonable construction the two statutes can stand together they must so stand. If harmony is impossible, and only in that event, the former law is repealed in part or wholly as the case may be."

State vs. Stoll, 17 Wallace, 430.

Board of Supervisors vs. Lackawana I. & C. Co. 93 U. S. 619.

Ex parte Crowdog, 109 U. S. 570.

Arthur vs. Homer, 96 U. S. 140.

In the case below Justice Story said: "That it has not been expressly or by direct terms repealed is admitted; and the question resolves itself into the narrow inquiry whether or not it has been repealed by necessary implication. We say by necessary implication, for it is not sufficient to say that subsequent laws cover some or even all of the cases provided for by it, for they may be simply affirmative or cumulative or auxiliary. But there must be a positive repugnancy between the provisions of the new laws and those of the old, and even then the old is repealed by implication only, *pro tanto* to the extent of the repugnancy."

Wood vs. United State, 16 Peters, 362.

Chew Heong vs. United States, 112 U. S. 536.

Counsel also rely upon Subdivision 30 of Section 37 of

the new charter of Boise City, adopted March 14, 1901, as an evidence of the intent of the law makers to do away with free water for the city. This section reads as follows: "To provide for the sprinkling, cleaning, repairing of all the streets in said city and to provide for the payment of the expense thereof. To levy a tax or special assessment upon the real property which shall be a lien upon said property until paid."

This provision has never been construed by the city or by any one connected with its enforcement to provide for other than the expense of putting the water upon the streets. No one has been charged for the value of the water and no one under the present law of the State could be. This is simply a means by which the property holders can be made to pay the cost of actual sprinkling, for teams and sprinkling apparatus, etc. To this extent it has been applied and no further. Counsel seem to labor under the impression that there is no other expense connected with the sprinkling of the streets other than the value of the water, or that the water would flow upon the streets and do its service without any expense. The expense provided for here is one which the city would otherwise have to pay and this is simply a means of making the property holders liable for it which they were not under the old charter.

It seems from the argument upon the trial of this cause that the cases upon which counsel relied in the bringing of this action are the following:

Los Angeles Water Co. vs. City of Los Angeles, 88 Fed. 720.

Santa Anna Water Co. vs. San Buena Ventura, 56 Fed. 339.

In the cases above cited there was an express contract in

writing entered into for a valuable consideration whereby the fixing of rates were agreed upon and it was expressly provided therein that in consideration of the parties doing certain things, releasing certain claims and putting in certain improvements, that the rates would not be reduced below a certain minimum stated. The provision of the contract which the honorable court construes is as follows: "Always provided that the mayor and common council of said city shall have and do reserve the right to regulate the water rates charged by said parties of the second part or their assigns, provided that they shall not so reduce such rates or so fix the price thereof to be less than those now charged by the parties of the second part." The case was devoted almost entirely to two questions. First, whether or not the city had the power to make the contract; and second, if so, whether or not the contract was void by reason of the fact that it was in the nature of a monopoly extending over thirty years. The fact that such a contract was made and that it was clear, certain and explicit was not doubted, while in the case at bar we contend there was no contract, no stipulation or agreement in question which covers the subject matter of the litigation.

In the other case the instance is one in which the city had no water works and entered into a full and complete contract to provide for the building of the same. In this contract it is expressly stipulated as to all matters touching the rates, etc., for a period of fifty years. The contract was assigned and after it was assigned the city expressly accepted the assignment and expressly granted to the assignees by ordinance the same rights which have been given to the assignors. This case throws but little light upon the case at bar, where the ordinance is silent upon this subject and silence is the same as a stipulation against them.

We may call attention here to the fact also in view of the language used in the Los Angeles case that there could be no more complete monopoly than would arise in favor of the water company here should the contention of the water company prevail. If the company is correct, then they are permitted to charge for water furnished the city by reason of this ordinance of 1889, while each and every other company must necessarily comply with the law of the State and take upon itself the burden of furnishing water free. This would be such a complete advantage that the other companies could not in any sense compete with the old company and according to the ordinance there is no limit in time to this right. The logic of their contention is that they have a right in perpetuity to use the streets and alleys of Boise City, to enjoy the franchise to sell water to the inhabitants and collect toll and rates and are absolutely free from this obligation of furnishing water free for fire purposes and other great necessities, which burden must rest upon all competitors. It would require very clear and explicit language in an ordinance, a grant, or a contract to permit a court, it seems to us, to hold in favor of such contention.

The plaintiff in this case is the successor of the Idaho company and undoubtedly was made the successor for the purpose of bringing this suit and for the purpose of giving the Federal couht jurisdiction.

Lehigh Co. vs. Kelley, 160 U. S. 320.

Lake County vs. Dudley, 173 U. S. 684.

But be that as it may, the plaintff company, of course, had no greater rights than had the Idaho company, and so far as the obligation imposed by the statutes of Idaho is concerned it stands in the same attitude as the old company. Article 2, Section 10 of our Constitution provides:

"No company or corporation formed under the laws of any other State or Territory shall have or be allowed to exercise or enjoy within this State any greater rights or privileges than those possessed or enjoyed by corporations of the same or similar character created under the laws of this State." A similar section of the Constitution of California has been construed by the Federal court and it was held that a foreign corporation seeking to avail itself of the fruits of the water laws must take on the burden which the law imposes also. In the case at bar these people went into a foreign State, as we contend, for the sole purpose of relieving themselves from a burden which would exist in case they remained a domestic corporation. But they cannot go into a city and State and avail themselves of the right to furnish water to the inhabitants of the city without at the same time taking on themselves the duty which the State imposes upon all who undertake to carry on this business.

San Diego Town Co. vs. National City, 74 Fed. 80.
Lanning vs. Osborne, 76 Fed. 319.
San Diego vs. National City, 174 U. S. 740.

We direct the Court's attention also to the fact that the ordinance upon which so much stress is laid as to the special right or privilege of this company was approved October 3, 1889. That the Constitution of the State of Idaho was adopted August 6, 1889, and finally ratified the first Tuesday of November, 1899, and in this Constituaion was this provision: "Article 2, Section 1. All existing charters or grants of special or exclusive privileges under which corporators or grantees shall not have organized or commenced business in good faith at the time of the adoption of this Constitution shall thereafter have no validity."

The burden was upon the complainant to show that they had earned this franchise as all presumptions are against them. The complaint shows that the Idaho company was organized March 27, 1891. (Transcript, page 110.)

Until work is done under a grant or charter and some expenditures made the charter or grant may be taken away or repealed. Mere acceptance is not enough.

Brannon on 14th Amendment, page 365.

Walla Walla vs. Company, 172 U. S. 172.

Hamilton vs. City, 146 U. S. 963.

Pikes Peak vs. Col. 105 Fed. 1.

We contend that the Idaho company, being a mere creature of the law, had no authority, without the consent of the city, to transfer its franchise and thus authorize a stranger to the city to come into the city and exercise this franchise; that the plaintiff company has not either plead or proven sufficient facts to enable it to exercise this franchise. This point is particularly pertinent to the equity case.

This brief is already being extended to such length that we will not enter into an argument upon this matter, but will content ourselves with citing Constitution and the authorities which we believe to sustain our contention.

We have already quoted Section 1, Article 15, and we now quote Section 2 of the State Constitution: "The right to collect rates or compensation for the use of water supplied to any county, city or town or water district or the inhabitants thereof is a franchise and cannot be exercised except by authority of and in the manner prescribed by law." Under Sections 1 and 2, Article 15 of the Constitution all water, however appropriated, is subject to public control and the right to sell and distribute the same is a franchise. We claim that the present corporation wholly fails to dis

close any authority under the law to collect rates or to do business in Boise City and that its pretended purchase of the Idaho company's franchise was void.

Brunswick vs. Gas. Co. 35 Am. St. 385.
Visilia vs. Simms, 37 Pac. 1042.
Thomas vs. Railway Co. 101 U. S. 952.
Pullman Co. vs. Transportation Co. 139 U. S. 1.
Penn Ry Co. vs. St. Louis Ry Co. 118 U. S. 84.
Gibbs vs. Gas Co. 130 U. S. 979.
O. R. & N. Co. vs. O. R. Co. 130 U. S. 837.

We have been discussing this case so far as if the plaintiffs had proven the material allegations of their complaint, but as a matter of fact at the time that the learned judge below ruled against them upon the introduction of evidence, at the time they rested and the Court instructed the jury on matters of which they now complain, there was practically no evidence before the Court upon any of the main questions upon which they now rely for reversal. That is to say, they had not proven the allegations of their complaint at all. At the time that the Court ruled against the plaintiff as to the value of this water and instructed the jury there was before the Court the articles of incorporation of the plaintiff and of the Idaho company, the deed purporting to convey the property and franchise from the old company to the new, the fact that the city had taken the water and not paid for it, the fact that the waters were developed from artesian wells, the supply of the company and the additional expense necessary by reason of the street sprinkling and the cost of the water company's system, and this practically constituted their proof. They did not see fit to proceed and prove the material allegations of their com-

plaint, all of which we denied, neither did they see fit to offer to prove any of these allegations. It will be noticed by referring to the answer that the answer denies the amount in controversy; denies allegations in paragraphs 4 and 5, except as to the ordinance; puts in issue the allegation of the complaint; that the Boise Water Works Company assumed no other duties or liabilities than that which belonged to the Eastman Brothers, or that said company was ever treated as the successors of the Eastman Brothers; denies that they were ever dealt or treated with or considered as their successors; denies the allegation with reference to Peter Sonna enjoying a similar franchise, and in fact puts in issue every material allegations of the complaint. We submit, therefore, that whatever view might be taken of this case if they had proven all the material allegations of the complaint, which evidently they could not do or they would have done so, as the record now stands there is nothing in the proof to relieve them from the obligation of furnishing water free.

Upon page 36 of the counsel's brief they say: "Had the Eastman Brothers continued to hold the water works property and the rights, privileges and benefits ordained to them, etc., and to operate the water works continuously from the time such ordinance was passed to the present time, etc., there is no question but they would stand as does Mr. Sonna, independent of any obligation to furnish free water."

In the first place, there is no proof here as to how Mr. Sonna stands; and in the second place, we will admit for the sake of argument that had Eastman Brothers continued to own this property they would not have had to furnish water free, but this was not by reason of any virtue in the ordinance of October 3, 1889; it was not by reason of

this ordinance that Eastman Brothers would be relieved, as that ordinance does not touch that subject. It would be simply because the Legislature had not seen fit to impose that obligation upon individuals. But the Legislature could have done so at any time it desired to do so. The moment the Eastman Brothers came into the city, dedicated their property to a public use, they subjected it thereby to public control and all reasonable regulations and obligations which the Legislature might see fit to impose. Therefore had Eastman Brothers continued to hold this property the Legislature could have imposed this obligation upon them had it simply amended the law and included them.

Upon page 37 of the brief, quoting from the opinion, it seems, of other attorneys, the counsel say: "The Eastmans necessarily took this franchise when they accepted it with the implied obligations and terms that they would furnish mountain water to the extent of their means *to the city* and its inhabitants, at reasonable rates and without discrimination and they received it with the correlative implied right to charge and collect reasonable and uniform rates for water furnished the city and its inhabitants." The vice of this reasoning consists in the ignoring of the well established rule with reference to the interpretation of grants or franchises which we have already referred to in a former part of the brief. The reasoning here is the same argument used by Justice Story in his dissenting opinion in the famous Charles River bridge case, but never accepted by the Courts. We ask where they get their implied rights when you come to interpret an ordinance, a grant, or a franchise which has been passed or given by a city to an individual or a corporation? It is certainly not a necessary implication that an ordinance which gives a right to collect rates from the inhabitants also gives a right

to collect rates from a city when the ordinance itself confines its language entirely to the inhabitants. It was said in the 30th Feberal, 327, heretofore cited: "Nothing passes unless it is obvious that the intent was that it should pass. He who says that the city has given him a franchise will be compelled to show that the right claimed is within the terms of the grant. * * * Any ambiguity in the terms of the grant must operate against the corporation." Now in referring to this ordinance we find that the subject matter of furnishing water to the city is not mentioned, much less the question of rates, or how it should be furnished. This being true under the well established rule, the construction must be in favor of the public. For this company can claim nothing, nor could the Eastman Brothers, which "is not clearly given by the law." Certainly there is no contract or stipulation in the ordinance prohibiting the Legislature from imposing either upon Eastman Brothers or their successors the burden of furnishing free water.

The ordinance of October 3, 1889, instead of reading as one would infer from the language of Messrs. Dickson and Ellis, says: "Of supplying mountain water to the *residents of Boise City* are hereby authorized," etc. The ordinance is very careful to confine the authority to supply water to the residents. Under what rule of interpretation of ordinances and grants can they read into this ordinance the supplying of water to the city when the ordinance itself confines the authority solely to the inhabitants? The distinction as to supplying water to the inhabitants and to the city is one which is made by statute and one which existed under the laws of the State of Idaho at the time this ordinance was given. It is peculiarly strange that if Eastman Brothers or anybody else supposed this related to the city also that they did not make some proof or offer

of proof of this in the Court below, that they did not show that Eastman Brothers themselves received some pay from the city, that they did not show what the relationship of Eastman Brothers was to the city while they exercised this right. That might have thrown some light on the subject.

This ordinance, however, is not ambiguous, which of itself would resolve the matter in favor of the public, but it is plain and specific, simply referring alone to the matter of supplying water to the inhabitants, saying nothing about the city, and even as to this it purports to say nothing more than to give them the right to come into the city. In the matter of fixing rates and in all matters with reference to machinery for supplying the inhabitants it is left open entirely to future legislation. We plead in our answer and stood ready to prove that the company is now collecting rates which were fixed under the provisions of the statute which they say this ordinance rendered nugatory as to this company. The company has never purported to act under any other theory.

Upon page 4 of counsel's brief they say: "That said statute is repealed by the Constitution of Idaho and by the acts of the Legislature thereunder." The Supreme Court of the State of Idaho has held this act constitutional. It being a question of the effect of the adoption of the State Constitution upon the statute, and the Court having held that the law is constitutional, we assume that it will be accepted by the Federal Court.

Boise City vs. A. H. C. Co. 39 Pac. 562.

Upon the same page they also say: "That neither the plaintiff nor its predecessor received from the State or the city any franchise," etc. The Idaho company took its franchise to do business from the State of Idaho. It was

incorporated for a specified purpose stated in its articles of incorporation. When it took this franchise to do business it informed the State that that business was to furnish water to the inhabitants to Boise City and to the city. (Transcript, page 110.) When it did so it necessarily agreed with the State that after organizing for this purpose, in consideration of the privilege given to it by the State, that it would furnish water to the city free of charge for fire and other great necessities. As we have before stated, it was a part and parcel of the contract with the city. Upon page 5 it is stated that they "are operating and always did operate under and by virtue of a grant made not to any corporation but to two individuals." We call attention to the fact that this is specifically denied in the answer and there is no proof whatever on the subject. We stand ready under the allegations of the answer to prove that this so-called franchise or ordinance of October 3, 1889, had never been recognized or accepted or plead in any of the litigation heretofore had with reference to this matter; at any rate, there is no proof upon this subject whatever.

They also contend that the nature of the water annuls the statute, that because this water was hot water the statute does not apply. This argument will be found upon page 5 of the brief. We have been unable to find any distinction made by the statute as to hot and cold water. Upon page 9 of the brief it is stated that Eastman Brothers accepted such grant or franchise and continued to lay water pipes in the streets, etc. We, also, in this connection call attention to the statement of facts, or what purports to be the facts, upon pages 10, 11, 12, 13 and also 33, 34. Counsel quote the allegations of their complaint as if proof had been introduced upon these matters. These allegations were each and all denied, and, as we have stated before,

there was no proof introduced or offered to prove these allegations which are referred to upon these pages. We do not think that had the proof been introduced it would have changed the law of the case; nevertheless, it is hardly proper to argue from these facts as a basis when they were not proven in the case and when the error complained of is that of having instructed the jury to return a verdict for the defendant.

Upon page 30 it is said that the whole contention grows out of the fact that the defendant city has since March, 1900, claimed to be entitled to free water, etc. This statement has so often been repeated that it is worth while to state that it is entirely gratuitous upon the part of counsel. This contention as to free water has not arisen since 1900. It has been the subject of contention ever since the company has been in existence, some years the council making a contract when they were favorable to the company and some years not. The case which we cited from 39 Pacific, arose out of the same contention which gives rise to this case, and while, as we have already stated, there could be no such thing as an estoppel by reason of void contracts, yet it is but fair to say that the contention that this litigation is a new thing is incorrect as the reported cases show. Upon page 32 of the brief counsel indulge in some distinction a little difficult to grasp, wherein it is sought to show that the Idaho company being formed under the general law took none of the obligations of Section 2711. Of course the corporation was formed under the general law with reference to the formation of corporations. It could have been formed in no other way, but the specific purpose for which it was formed is stated in its articles of incorporation and this, under the statute, gives rise to the obligation, for the statute says "all corporations formed to supply

water." It does not say, as counsel would have it appear, that all corporations which have secured a franchise from the city must do so and so, but its contract is with the State and therefore when it is *formed* for the specific purpose of supplying water to a city or town it contracts to discharge the obligation imposed upon it by Section 2711. Following this line of argument they say upon page 42: "Such corporation is only subject to the burden of furnishing free water imposed by Section 2711 when it has secured the rights, franchise and privileges from the State or city." This is in a sense correct and it did secure the right and privilege from the State when it incorporated for the purpose of supplying water to the inhabitants of any city or town, and when the State gave it this privilege or franchise it exacted an agreement which by incorporating was accepted and constituted the contract between the State and the corporation. Now, after it had entered into this contract with the State, it is true it purchased the Eastman Bros.' franchise so-called. But when it did so it did not purchase anything which relieved it from this obligation which it had already assumed because the Eastman Brothers' grant was silent upon the subject matter with which it was contracting with the State, that is, to furnish free water. Had the Eastman Brothers' contract provided in the language of the 56 Federal, 399, relied upon by counsel, specifically that they should furnish water to the city and should fix their own rates or such rates as might not fall below a certain figure, they would undoubtedly be in a different position, but they must be able to place their finger upon the contract which relieves them from this obligation. "Silence is negation."

In conclusion, we say—

First, That under the statutes of the State of Idaho, the

Idaho company and its successors were obligated to furnish water free to the city for fire purposes and other great necessities, which include sprinkling the streets.

Second, That the ordinance of October 3, 1889, in no wise referred to the matter of furnishing water to the city, nor did it contain any contract of any kind against the right or power of the Legislature to impose upon the Eastman Brothers or their successors the obligation of furnishing free water—that said ordinance was wholly silent upon the subject of the duty of Eastman Brothers or their successors to the city and that therefore when they incorporated and took upon themselves a corporate existence they assumed the obligations and duties imposed upon such corporations by law.

Third, That Section 2711 being a part of the general laws of the State became a part of the contractural relation between the corporation when it was formed for this purpose and the State and that inasmuch as there is nothing in the ordinance of October 3, 1889, to relieve them from that obligation they are bound by the general laws of the State.

Fourth, That the plaintiff wholly failed to make any proof of the allegations of the complaint upon which they chiefly rely in their argument in support of the contention that they were relieved from this duty imposed by Section 2711.

Fifth, That the complainant company has not proven any right or franchise to do business in Boise City or to collect rates from either the inhabitants or the city and wholly fails to disclose any authority upon the part of the Idaho company to sell its franchise or authorize its successor to enter into the city and exercise and enjoy this franchise.

Sixth. That the contracts which were made between the water company and the city referred to in the complaint, were void under the laws of the State of Idaho and could not in any way estop the city from repudiating them at any time it chose to do so, as the water company was bound to know the extent to which the city could go in making such contracts.

Seventh. That Section 2711 has been held to be constitutional by the Supreme Court of the State of Idaho and that no repeal of said Section has been had either directly or by implication.

Respectfully submitted,

JOHN J. BLAKE,
CHARLES S. KINGSLEY AND
W. E. BORAH,
Attorneys for Defendant in Error.